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Edward J. Schoen
Rowan University, schoen@rowan.edu

Diane Y. Hughes
Rowan University, hughes@rowan.edu

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KISOR V. WILKIE: CABINING ADMINISTRATIVE AGENCIES' DEFERENCE IN INTERPRETING REGULATIONS

EDWARD J. SCHOEN *
DIANE Y. HUGHES **

I. (INTRODUCTION

Kisor v. Wilkie[1] was one of the most anticipated and closely watched cases of the U.S. Supreme Court's 2018-2019 term. (As noted in SCOTUSblog, the *Kisor* case "could be one of the most consequential of the term, because the justices will decide whether to overrule a line of cases instructing courts to defer to an agency's interpretation of its own regulation." The Court's ruling, the blog noted, "could have a significant impact far beyond veterans' benefits, from the environment to immigration, and it could also shed more light on when and whether the justices are willing to overrule their prior cases.[2] Moreover, *Kisor* is "significant because it is part of a broader conservative attack on the administrative state, and the consequences of that attack, if successful, could be tremendous." Likewise, the recent additions of Justices Gorsuch and Kavanaugh to the Court heightened

* Professor of Management, Rohrer College of Business, Rowan University, Glassboro, New Jersey
** Associate Professor of Accounting, Rohrer College of Business, Rowan University, Glassboro, New Jersey
[1] Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
[2] Amy Howe, *Justices To Tackle Important Agency-Deference Question*, SCOTUSBlog (Mar. 20, 2019, 11:55 AM), https://www.scotusblog.com/2019/03/argument-preview-justices-to-tackle-important-agency-deference-question/. (

expectations that the Court would terminate the deference accorded agencies in interpreting their own regulations,[3] particularly because the U.S. Supreme Court in granting certiorari stipulated the sole issue to be addressed was whether its two prior decisions establishing deference should be overruled.[4] Finally, *Kisor* clearly attracted the keen interest of business groups and conservatives who want to weaken federal regulators and have targeted the deference precedents for overturn, because, in their view, the deference theory "gives agencies too much power."[5]

This article closely examines: (1) the two major U.S. Supreme Court decisions—*Seminole Rock* and *Auer*—which recognized and launched the judicial deference granted to agency interpretation of its own regulations; (2) two U.S. Supreme Court decisions—*Gonzales v. Oregon*

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[3] Brianne Gorod, *Why Kisor is a Case to Watch*, SCOTUSblog (Jan. 31, 2019, 11:14 AM), https://www.scotusblog.com/2019/01/symposium-why-kisor-is-a-case-to-watch/. (*See,* Erwin Chemerinsky, *What SCOTUS rulings are we still waiting for?*, ABA JOURNAL (May 2, 2019), https://www.abajournal.com/news/article/chemerinsky-remaining-rulings-to-address-administrative-state-stare-decisis. ("Many have suggested that the conservative majority on the Supreme Court wants to impose greater judicial oversight of the actions of federal administrative agencies. (Both of the two newest justices, Neil M. Gorsuch and Brett Kavanaugh, advocated this in their decisions as federal court of appeals judges. (This has led to much discussion of whether the high court might reconsider its ruling in *Chevron*, which held that courts should defer to federal agencies in their interpretation of the statutes that they are implementing. (Although no case this term is likely to reconsider *Chevron* deference, in *Kisor v. Wilkie*, the court will consider a related doctrine: the principle that courts should defer to agencies in interpreting their own regulations.")

[4] Kisor, 239 S. Ct. at 2409.

[5] Debra Cassens Weiss, *Auer Deference Precedent Targeted By Business Groups May Be Overturned by SCOTUS*," ABA JOURNAL (December 10, 2018), https://www.abajournal.com/news/article/supreme_court_to_consider_overruling_auer_deference_precedent_targeted_by_b.

and *Christopher v. SmithKline Beecham Corp.*—which have imposed limitations on judicial deference to government agencies' interpretation of their own regulations; (3) the U.S. Supreme Court's decision in *Kisor*; and (4) the reactions of legal experts and commentators to the *Kisor* decision. (The article also examines the U.S. Supreme Court decision in *Chevron*, which decided that regulations developed by government agencies interpreting genuinely ambiguous statutes are also entitled to judicial deference, contrasts *Chevron* deference to *Kisor* deference, and predicts that *Kisor* will have little substantive influence on *Chevron* deference. (

II. (*SEMINOLE ROCK* AND *AUER'S* DEFERENCE TO AGENCIES' INTERPRETATION OF AMBIGUOUS REGULATIONS

The judicial doctrine of granting deference to an administrative agency's interpretation of its own genuinely ambiguous regulation stems from two U.S. Supreme Court decisions: *Bowles v. Seminole Rock & Sand Co.*[6] and *Auer v. Robbins.*[7] In *Seminole Rock*, the U.S. Supreme Court reviewed price control regulations issued by the Administrator of the Office of Price Administration ("OPA") under Section 2(a) of the Emergency Price Control Act of 1942,[8] the central component of which prohibited sellers from charging any more than the prices charged during the selected base period of March 1 to 31, 1942.[9]

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[6] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

[7] Auer v. Robbins, 519 U.S. 452 (1997).

[8] 56 Stat. 23, 24, 50 U.S.C.A. Appendix s 902(a); Seminole Rock, 325 U.S. at 411.

[9] Seminole Rock, 325 U.S. at 413 ("On April 28, 1942, . . . [the Administrator] issued the General Maximum Price Regulation. (This brought the entire economy of the nation under price control with certain minor exceptions. (The core of the regulation was the requirement that each seller shall charge no more than the prices which

OPA made subsequent refinements of this restriction for specific groups of commodities.[10] One such refinement was Maximum Price Regulation 188, which covered specified building materials and consumer goods:

> [T]he maximum price for any article which was delivered or offered for delivery in March, 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March, 1942 (as defined in s 1499.163) for the article. (Section 1499.163(a)(2)6 in turn provides that for purposes of this regulation the term: Highest price charged during March, 1942 means (i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942; or (ii) If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or (iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's

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he charged during the selected base period of March 1 to 31, 1942. (While still applying this general price 'freeze' as of March, 1942, numerous specialized regulations relating to particular groups of commodities subsequently have made certain refinements and modifications of the general regulation. (Maximum Price Regulation No. 188, covering specified building materials and consumers' goods, is of this number.")

[10] *Id.* at 413.

> customary differential between the two classes of purchasers.[11]

Respondent, Seminole Rock and Sand Co. ("Seminole"), a manufacturer of crushed stone which was subject Maximum Price Regulation No. 188, had several relevant sales of crushed stone.[12] In October 1941, prior to the effective date of Maximum Price Regulation No. 188, Seminole agreed to sell crushed stone to Seaboard Air Line Railway ("Seaboard") on a demand basis at 60 cents per ton, and actually delivered the stone to Seaboard in March 1942.[13] In January 1942, Seminole also agreed to sell crushed stone to V. P. Loftis Co., for $1.50 a ton.[14] Some of the crushed stone was delivered in January 1942; the remainder of the crushed stone was delivered in August 1942.[15] After the effective date of Maximum Price Regulation No. 188, Seminole agreed to sell crushed stone to Seaboard at 85 cents and $1.00 per ton.[16]

OPA challenged the price Seminole charged Seaboard (85 cents and $1.00 per ton) in Federal District Court, claimed the maximum price Seminole could charge was 60 cents per ton (the price Seminole charged for the crushed stone when it was delivered in March 1942), and sought an injunction preventing Seminole from violating Maximum Price Regulation No. 188.[17] The District Court determined that the highest price charged by Seminole during March, 1942, was $1.50 per ton, and that Seminole's sale of crushed stone to Seaboard did not exceed that ceiling

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[11] *Id.* at 414-15 (internal quotation marks omitted).
[12] *Id.* at 412.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 412-13.

price.[18] The Fifth Circuit Court of Appeals affirmed, and the U.S. Supreme Court granted certiorari.[19]

The U.S. Supreme Court noted that the central issue to be resolved was the meaning and applicability of Rule (i) of Maximum Price Regulation 188.[20] Seminole took the position that, in order for Rule (i) to apply, both the establishment of the sales price and the delivery of the crushed stone must have been occurred in March, 1942, and hence applying the 60 cents price ceiling was erroneous.[21] The OPA claimed that Rule (i) was applicable and controlling because there was an actual delivery of crushed stone in March, 1942.[22]

In resolving this issue, the Court observed that "more than one meaning may be attached to the phrase 'highest price charged during March, 1942' . . . and [that] the phrase might be construed to mean only the actual charges or sales made during March, regardless of the delivery dates . . . or

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[18] *Id.* at 412.

[19] *Id.* at 413.

[20] *Id.* at 415.

[21] *Id.*

[22] This position was promulgated by OPA in a bulletin issued by the Administrator entitled "What Every Retailer Should Know About the General Maximum Price Regulation," and made available to manufacturers, wholesalers and retailers, in which the Administrator stated: "The highest price charged during March 1942 means the highest price which the retailer charged for an article actually delivered during that month or, if he did not make any delivery of that article during March, then his highest offering price for delivery of that article during March" and "It shall be carefully noted that actual delivery during March, rather than the making of a sale during March is controlling." This position was also published in the Administrator's First Quarterly Report to Congress, in which he defined the "highest price charges" as follows: "(1) It means the top price for which an article was delivered during March 1942, in completion of a sale to a purchaser of the same class .... (2) If there was no actual delivery of a particular article during March, the seller may establish as his maximum price the highest price at which he offered the article for sale during that month." *Id.* at 417.

to charges made for actual delivery in March."[23] The Court agreed with the position advanced by OPA: "We can only conclude, therefore, that for the purposes of rule (i) the highest price charged for an article delivered during March, 1942, is the seller's ceiling price regardless of the time when the sale or charge was made."[24] This conclusion was facilitated by the Court's earlier statement that, in interpreting an administrative regulation, "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt" and "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[25]

In *Auer*, police sergeants and a lieutenant employed by the St. Louis Police Department brought suit against members of the St. Louis Board of Police Commissioners ("Board") to obtain overtime pay under § 7(a)(1) of the Fair Labor Standards Act of 1938.[26] The Board denied their eligibility for overtime pay, reasoning that the police officers were exempt "bona fide executive, administrative or professional" employees.[27] Under Department of Labor (DOL) regulations, one requirement for exempt status was that "the employee earn a specified minimum amount on a 'salary basis,' " *i.e.*, the employee must "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reductions because of variations in the quality or quantity of the work

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[23] *Id.* at 415.

[24] *Id.* at 416.

[25] *Id.* at 414. (This statement of deference was made with neither legal authority nor even limited reasoning. (Linda D. Jellum, *Will the Supreme Court Retain, Cabin, or Eliminate Seminole Rock and Auer Deference?*, 46 ABA PREVIEW 35, 37 (2019).

[26] Auer, 519 U.S. at 455; 29 U.S.C. § 207(a)(1). (

[27] Auer, 519 U.S. at 455.

performed."[28] The police officers argued that, because their compensation could be cut for a variety of disciplinary infractions which were related to the "quality or quantity" of the work performed, they did not qualify as salaried employees and were entitled to overtime compensation.[29] The District Court found the police officers were paid on a salary basis and were not entitled to overtime pay; the Eighth Circuit of Court of Appeals affirmed; and the U.S. Supreme Court granted certiorari.[30]

The U.S. Supreme Court noted (1) the Department of Labor ("DOL") policy manual lists a total of 58 possible rule violations and a corresponding range of disciplinary penalties for each violation (some of which involve deductions in pay); (2) all department employees are nominally covered by the manual; and (3) the manual does not single out a category of employees (salaried or non-salaried) for whom pay deductions are a form of punishment.[31] The Secretary of Labor in an *amicus* brief argued that the imposition of pay deduction penalties would undermine the exemption for salaried employees only if the pay deduction penalties are employed "as a practical matter," *i.e.*, there is an actual practice of making pay deductions or the agency's policy creates a "significant

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[28] *Id.*, citing 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e), 541.118(a) (1996). (The U.S. Supreme Court summarized the history of the salary-basis test as follows:

> The FLSA did not apply to state and local employees when the salary-basis test was adopted in 1940. (In 1974 Congress extended FLSA coverage to virtually all public-sector employees, and in 1985 we held that this exercise of power was consistent with the Tenth Amendment. The salary-basis test has existed largely in its present form since 1954, and is expressly applicable to public-sector employees.

Auer, 519 U.S. at 457 (internal citations omitted).

[29] *Id.* at 455.

[30] *Id.* at 455-56

[31] *Id.* at 462.

likelihood" pay deductions will be made.[32] Because there was no indication of either an actual practice of deducting police officer's pay,[33] or an employment policy which makes the imposition of pay deductions significantly likely in the case of police officers, it was possible (1) that pay deduction penalties apply only to non-salaried employees, or (2) that the pay deduction policy was not or would not be invoked against salaried employees.[34] Hence, the existence of pay deduction penalties was insufficient to disqualify the police officers as salaried employees.[35] Moreover, the Court noted, the Secretary of Labor's interpretation of the DOL's own regulations is controlling unless it is "plainly erroneous or inconsistent with the regulation," and hence is entitled to judicial deference.[36] Furthermore, the Court stated, there is no reason to doubt the Secretary's interpretation actually reflects the agency's "fair and considered judgment" on the issue, and there is no need to require the Secretary to interpret his own regulations narrowly, because he is "free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute."[37] Hence, judicial deference to the agency's interpretation of its own regulation carried the day, and the Court upheld the police officers' exempt status under the overtime provisions of FLSA.[38]

Seminole Rock and *Auer* provide substantial deference to the government agency's interpretation of its

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[32] *Id.* at 461.

[33] The record showed that the salary of one police officer, Sergeant Guzy, was voluntarily reduced. (Because Sergeant Guzy did not reside in St. Louis, he violated the police department's residency requirement. (In order to keep his job, he agreed to a one-time reduction in his pay. (Because this pay reduction was not related to a disciplinary matter, it did not disqualify him as a salaried police officer. (*Id.* at 463.

[34] *Id.* at 462.

[35] *Id.* at 461.

[36] *Id.*

[37] *Id.* at 462-63.

[38] *Id.* at 464.

own regulations: the regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[39] In *Seminole Rock*, the Court gleaned the government agency's interpretation of the regulation from a bulletin issued by OPA prior to its challenge to the price Seminole charged Seaboard for the crushed stone and from an annual report issued by OPA.[40] In *Auer*, the Court gleaned the government agency's interpretation of the regulation from the DOL's *amicus* brief drafted well after the police officers initiated their claim for overtime pay.[41] Regardless of the source and the timing of the interpretation, substantial deference was due. (

A succinct summary of the arguments in support of and in opposition to *Seminole Rock* and *Auer* deference appears in SCOTUSblog.[42] Supporters of deference claim that it derives from the *Chevron* doctrine,[43] under which courts will generally accept the agencies' interpretation of ambiguities in its enabling legislation as long as that interpretation, appearing the agencies' regulations, is reasonable. (Similarly, supporters contend deference should be accorded to agencies in interpreting ambiguities in their regulations, because the agency which wrote the regulation likely knows best what it means. (Supporters also argue that granting *Seminole Rock* and *Auer* deference facilitates courts' reviews of challenges to an agency's interpretation of its regulation, because the sole question to be resolved by the court is whether the agency's interpretation is reasonable, avoiding the struggle of determining the best interpretation. Likewise, supporters argue, granting deference to the agencies' interpretation of their own

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[39] Seminole Rock, 325 U.S. at 414, and Auer, 519 U.S. at 461.
[40] Seminole Rock, 325 U.S. at 414.
[41] Auer, 519 U.S. at 461.
[42] Howe, *supra* note.
[43] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). (*See, infra,* text accompanying notes 175 - 197.. (

regulations likely produces greater consistency in court decisions, because courts throughout the country are more likely to uphold the agency's interpretation.[44]

Opponents of *Seminole Rock* and *Auer* claim that deference confers too much power on administrative agencies to announce its interpretation of its regulations without engaging in rule-making procedures involving notice, comment, and rule resolution; deference also short circuits the Administrative Procedures Act which assigned the role of resolving ambiguities in regulations to the courts, rather than administrative agencies.[45] Moreover, opponents argue, deference stymies individuals who struggle to comply with the agencies' regulations only to discover later that the agency has a different interpretation of the regulation. (Most importantly, opponents contend, deference raises constitutional concerns, because (1) an agency's interpretation of its own regulations does not give adequate and fair notice to individuals affected by the regulation in violation of due process, and (2) deference improperly skews the separation of powers, because courts abdicate their responsibility to interpret the law and act as a check on the political branches of the government.[46]

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[44] Howe, *supra* note. (*See,* Gillian Metzger, *The puzzling and troubling grant in Kisor*, SCOTUSblog (Jan. 30, 2019, 10:22 AM), https://www.scotusblog.com/2019/01/symposium-the-puzzling-and-troubling-grant-in-kisor.

[45] 5 USC §551 *et seq.* (1946).

[46] Howe, *supra* note. *(See,* Jonathan Adler, *Government agencies shouldn't get to put a thumb on the scales*, SCOTUSblog (Jan. 31, 2019, 2:36 PM), https://www.scotusblog.com/2019/01/symposium-government-agencies-shouldnt-get-to-put-a-thumb-on-the-scales/; Elizabeth Murrill, *Reverse Seminole Roc and Auer*, SCOTUSblog (Jan. 30, 2019, 1:40 PM), https://www.scotusblog.com/2019/01/symposium-reverse-seminole-rock-and-auer/; Adrian Vermeule, *Tampering with the structure of administrative law*, SCOTUSblog (Jan. 29, 2019, 10:23 AM), https://www.scotusblog.com/2019/01/symposium-tampering-with-the-structure-of-administrative-law/; and Kimberly Hermann, *The Supreme Court and the forgotten "Three Ring Government"*,

III. U.S. SUPREME COURT LIMITATIONS ON *AUER* AND *SEMINOLE ROCK*

Since deciding *Seminole Rock* and *Auer*, the U.S. Supreme Court has twice re-examined and narrowed their scope: (1) deference is not due when "the underlying regulation does little more than restate the terms of the statute itself," and (2) deference is not due when the agency's interpretation would "impose potentially massive liability...for conduct that occurred well before [an agency's] interpretation was announced."[47]

The first limitation was recognized in *Gonzales v. Oregon*,[48] in which the Court refused to grant deference to an interpretive rule of the United States Attorney General threatening criminal action against physicians who assist in the suicide of terminally ill patients pursuant to Oregon's Death With Dignity Act ("ODWDA").[49] Under ODWDA, upon the request of a terminally ill patient, physicians are permitted to dispense or prescribe lethal doses of drugs which are regulated under the Controlled Substances Act ("CSA").[50] The drugs prescribed under ODWDA are

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SCOTUSblog (Jan. 29, 2019, 2:19 PM), https://www.scotusblog.com/2019/01/symposium-the-supreme-court-and-the-forgotten-three-ring-government/.

[47] Jellum, *supra* note, at 37.

[48] Gonzales v. Oregon, 546 U.S. 243 (2006).

[49] *Id.* at 249; Ore. Rev. Stat. § 127.800 *et seq.* (2003). (In order to be eligible to request a prescription under ODWDA, patients must receive a diagnosis from their attending physician that they have an incurable or irreversible disease that, within reasonable medical judgment will cause death within six months. (Gonzales, 546 U.S. at 252. (ODWDA was enacted in 1994 and survived a ballot measure seeking its repeal in 1997. (*Id.*

[50] Gonzales, 546 U.S. at 252; 84 Stat. 1242, as amended, 21 U.S.C. § 801 *et seq.* (The attending physician is required to confirm the patient's request is voluntary and informed, and, if not, to refer the patients to counseling to ascertain whether they are suffering from a psychological disorder or depression causing impaired judgment. (If the attending

Schedule II drugs which, in order to prevent the diversion of controlled substances, may be prescribed only pursuant to a written, nonrenewable prescription issued by a physician registered with the Attorney General.[51] Notably, CSA explicitly does not preempt state law unless the specific provision of the state law is in "positive conflict" with a provision of CSA.[52]

On November 9, 2001, seven years after the enactment of ODWDA, the Attorney General, John Ashcroft, issued an interpretive rule intended to restrict the use of controlled substances in physician-assisted suicide.[53] The interpretive rule stated: (1) assisting suicide is not a

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physician determined the request is voluntary and informed, a second, consulting physician must examine the patient and the patient's medical records and confirm the attending physician's conclusion. (The physicians must keep detailed medical records of the process leading to the final prescription, and are prohibited from administering the lethal drug. (The patients end their lives by ingesting the medication prescribed. (Gonzales, 546 U.S. at 252.

[51] "When deciding whether a practitioner's registration is in the public interest, the Attorney General shall consider:
(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.
(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
(5) Such other conduct which may threaten the public health and safety."
Id. at 251 (internal quotation marks omitted.)

[52] *Id.* ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together. § 903")

[53] Gonzales, 546 U.S. at 249.

valid medical practice and is unlawful under the CSA, and (2) the registration of physicians who prescribe, dispense or administer federally controlled substances may be revoked or suspended.[54] Because a physician is prohibited from prescribing controlled substances unless he is registered with the Attorney General, the revocation or suspension of the physician's registration threatened to "substantially disrupt the entire ODWDA regime."[55] In response, the State of Oregon challenged the interpretive ruling in Federal District Court, which issued a permanent injunction against its enforcement.[56] A divided panel of the Ninth Circuit Court of Appeals affirmed, because either the interpretive rule impermissibly made a medical procedure authorized under Oregon law a federal offense or the interpretive rule could "not be squared" with the language of the CSA.[57] The U.S. Supreme Court granted the Attorney General's petition for certiorari.

The U.S. Supreme Court addressed two principal issues in affirming the decision of the Ninth Circuit: (1) whether the Attorney General was authorized to interfere with Oregon's assisted suicide regimen, and (2) whether the interpretive rule was entitled to judicial deference.[58] In resolving the first issue, the Court observed that CSA gives the Attorney General limited powers to promulgate rules relating solely to the "registration" and "control" of identified controlled substances.[59] Because the interpretive rule did not relate to the addition or deletion of a drug to or from one of the five schedules established by CSA, it cannot fall under the Attorney General's control authority.[60] Nor

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[54] *Id.* at 249, 254.
[55] *Id.* at 254.
[56] *Id.* at 255.
[57] *Id.*
[58] *Id.* at 260.
[59] *Id.* at 260-261.
[60] *Id.*

does the power to control substances authorize the Attorney General to promulgate his view of legitimate medical practice.[61] Likewise, CSA restricts the authority of the Attorney General to deregister a physician's registrations to only circumstances involving (1) physicians who falsified their application, were convicted of a felony relating to controlled substances, or had their state license revoked, or (2) physician registrations that may be "inconsistent with the public interest," which is resolved by considering five factors, including the state's recommendation, compliance with state, federal and local controlled substances law, and public health and safety.[62] Because none of the factors identified in the first circumstance occurred, and because the interpretive rule did not consider the five required factors, the Court held that the Attorney General's interpretive rule cannot be supported by his authority to register.[63]

Addressing the second issue, the Court observed that the language in the regulation under which the Attorney General issued his interpretive rule was identical to the language appearing in CSA and hence there was no ambiguity to be resolved.[64] The Court noted:

> Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. (An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to

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[61] *Id.* at 260-61

[62] *Id.*

[63] *Id.* at 261.

[64] *Id.* at 257. (The regulation uses the terms "legitimate medical purpose" and "the course of professional practice." Because these terms are identical to two statutory phrases in CSA, the regulation fails to provide an interpretation of the statute. (

> formulate a regulation, it has elected merely to paraphrase the statutory language.[65]

Hence, the Court decided that "the CSA's prescription requirement does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct,"[66] and that judicial deference is not owed to administrative regulations that merely parrot the language of the enabling legislation because there is no ambiguity requiring interpretation.[67]

The second limitation imposed on *Seminole Rock* and *Auer*—namely, that deference is not due when the agency's interpretation imposes a potentially massive liability on parties relying on an agency's prior interpretation of a regulation—was recognized in *Christopher v. SmithKline Beecham Corp*,[68] in which the U.S. Supreme Court ruled that salespersons employed as pharmaceutical sales representatives by SmithKline Beecham ("SKB") qualified as outside salespersons and were exempt from the overtime pay provisions of the Fair Labor Standards Act.[69] Under regulations issued by the Department of Labor ("DOL") in 1938, 1940, 1949, and 2004, outside salespersons employed by pharmaceutical companies were deemed to be exempt employees not entitled to overtime pay, because they "in some sense made a sale."[70]

Nonetheless, two pharmaceutical representatives ("petitioners") employed by SKB initiated an action in Federal District Court seeking compensation for overtime

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[65] *Id.*
[66] *Id.* at 274-75.
[67] *Id.* at 258.
[68] Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012).
[69] *Id.* at 147.
[70] *Id.* at 148-49, citing 69 Fed.Reg. 22122 (2004).

pay.[71] The District Court agreed the two employees were exempt from overtime pay provisions and granted summary judgment in favor of SKB.[72] After the District Court entered its order, the petitioners filed a motion to amend the judgment based on the DOL's assertion in an uninvited *amicus* brief filed in a similar action pending in the Second Circuit that pharmaceutical representatives were not exempt employees, because they did not actually "make a sale" with the meaning of the regulations.[73] The petitioners asked the District Court to grant deference to the DOL's interpretation of the regulation appearing in the *amicus* brief, but the District Court denied the motion.[74] The Court of Appeals for the Ninth Circuit agreed the interpretation was not entitled to deference and affirmed, and the U.S. Supreme Court granted certiorari.[75]

The U.S. Supreme Court ruled that the interpretation of the regulation appearing in the *amicus* brief was not entitled to deference, because the DOL's revised interpretation imposed "potentially massive liability" on SKB and other pharmaceutical companies for conduct that transpired well before the interpretation was announced, contrary to the principles that agencies should provide regulated parties "fair warning of the conduct" mandated or prohibited by the regulation and that agencies should not change an interpretation of a regulation that imposes a "new liability" on individuals for past actions undertaken in good-faith reliance on an interpretation of a regulation.[76] Because (1) the pharmaceutical industry had no reason to suspect the DOL's longstanding interpretation would change, (2) the DOL never initiated any enforcement actions to suggest the

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[71] *Id.* at 152.
[72] *Id.* at 153.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 151-53.
[76] *Id.* at 156-57.

drug industry was acting unlawfully, (3) the DOL's announcement of its revised interpretation was preceded by a prolonged period of inaction, and (4) the nature of the work of pharmaceutical sales representatives had not materially changed for decades, the Court held that granting deference would constitute unfair surprise on the industry.[77] Hence, "whatever the general merits of *Auer* deference, it is unwarranted here."[78] Instead, the Court stated, the DOL's revised interpretation must be evaluated by "the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give the power to persuade."[79] The Court stated the revised interpretation, so evaluated, "lacks the hallmarks of thorough consideration" and is flatly inconsistent with the FLSA's definition of a sale to mean a consignment for sale.[80] Hence the Court determined that the DOL's revised interpretation is "neither entitled to *Auer* deference nor persuasive in its own right."[81] Employing "traditional tools of interpretation" to ascertain whether petitioners are exempt outside salespersons, the Court determined the DOL's revised interpretation is inconsistent with the text of FLSA, the definition of "sales" in related DOL regulations, and the intent of Congress to define "sale" in a broad manner.[82] Given this broader interpretation, the Court easily concluded "the petitioners made sales for the purposes of FLSA" and therefore are exempt outside salesmen not entitled to overtime compensation.[83]

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[77] *Id.* at 157-58.
[78] *Id.* at 159.
[79] *Id.*, citing U.S. v. Mead Corp., 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292.
[80] *Id.* at 159-60; 29 U.S.C.A. § 203(k).
[81] *Id.* at 160-61.
[82] *Id.* at 161-63.
[83] *Id.* at 165.

IV. *KISOR V. WILKIE*'S PROCEDURAL HISTORY

In 1982, Petitioner, James Kisor, a Vietnam War veteran, applied for disability benefits from the Department of Veterans Affairs ("VA"), claiming he suffered from post-traumatic stress disorder ("PTSD") stemming from his participation in a military action called Operation Harvest Moon.[84] Because the VA's evaluating psychiatrist determined that he did not suffer from PTSD, the VA denied Kisor's application for benefits.[85] Twenty-four years later, Kisor moved to reopen his claim, and, based on a new psychiatric report, the VA agreed that Kisor suffered from PTSD, but granted him benefits prospectively from the time of his motion to reopen rather than from the date of his first application.[86] The Board of Veterans Appeals ("the Board") affirmed the VA's timing decision on the basis of an agency rule permitting retroactive benefits if there were "relevant official service department records" which were not considered in its initial decision denying benefits.[87] While the Board recognized Kisor submitted two new service records that confirmed his participation on Operation Harvest Moon, the Board determined those records were not "relevant" to the previous psychiatrist's finding that he did not have PTSD.[88]

The Court of Appeals for Veterans Claims affirmed the Board's decision.[89] Granting deference to the Board's interpretation of the VA rule, the Court of Appeals for the

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[84] *Kisor*, 139 S. Ct. at 2409.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* ("[The] documents were not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat.")
[89] *Id.*

Federal Circuit affirmed.[90] In his argument to the Federal Circuit, Kisor claimed a service record is deemed "relevant" if it relates to some other criteria for obtaining disability benefits.[91] Facing Kisor's and the VA's differing interpretations of the VA rule, the Federal Circuit agreed the VA rule was ambiguous, because the VA rule did not specifically address whether "relevant" records must cast doubt on VA's prior decision denying benefits (the VA's interpretation) or may more broadly support the veteran's claim (Kisor's interpretation).[92] Because both Kisor's interpretation and the VA's interpretation were reasonable, the Federal Circuit granted deference to the VA's interpretation of the rule.[93] Hence, the VA's construction of its regulation prevailed, because it was not "plainly erroneous or inconsistent with the VA's regulatory framework."[94] Applying that standard, the Federal Circuit upheld the VA's interpretation and affirmed the denial of retroactive benefits; the U.S. Supreme Court granted certiorari.[95]

V. U.S. SUPREME COURT DECISION IN *KISOR V. WILKIE*

While the U.S. Supreme Court's decision in *Kisor* was unanimous in its judgment, the opinions are splintered.[96] Justice Kagan wrote the plurality opinion, in which Justices Ginsburg, Breyer and Sotomayor joined.[97] Chief Justice Robert concurred in parts I, II-B, III-A and IV.[98] Justice

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[90] Kisor v. Shulkin, 869 F.3d 1360, 1368 (2017).
[91] *Kisor*, 139 S. Ct. at 2409.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 2407.
[97] *Id.*
[98] *Id.* at 2424. (*See,* Sullivan and Cromwell LLP, Kisor v. Wilkie: *U.S. Supreme Court Upholds – But Limits – Auer Deference* (June 26, 2019)

Gorsuch concurred in the judgment, joined in full by Justice Thomas and in part by Justices Alito and Kavanaugh.[99] Justice Kavanaugh concurred in the judgment.[100]

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at 4, https://www.sullcrom.com/files/upload/SC-Publication-Kisor-v.-Wilkie-U.S.-Supreme-Court-Upholds%E2%80%93But-Limits%E2%80%93Auer-Deference.pdf (Chief Justice Roberts "suggested that the distance between the majority . . . and the concurrence in the judgment by Justice Gorsuch . . . is not as great as it may initially appear." He further observed that *Auer* raises concerns distinct from those raised by *Chevron*, which governs judicial deference to agency interpretations of statutes.")

[99] *Id.* ("Justice Gorsuch argued that *Auer*'s rule of deference should be overturned because it requires judges to 'abdicate their job of interpreting the law' in violation of both the APA and constitutional separation-of-powers principles. (He also contested the majority's invocation of *stare decisis*, arguing that the doctrine did not apply where, as here, the precedent at issue announced a general interpretive methodology rather than a specific holding about the meaning of a particular law. Justice Gorsuch also criticized the majority for appealing to *stare decisis* while simultaneously changing *Auer* by limiting its application.")

[100] *Kisor*, 139 S. Ct. at 2448. (Justice Kavanaugh agreed with Chief Justice Roberts that *Auer,* as cabined by the plurality opinion, reduced the distance between the majority view and Justice Gorsuch's view, but "not a great as it may initially appear." He stated that, if a reviewing court employed all of the traditional tools of construction, it will ascertain the best interpretation of the regulation. (He thought, however, that formally reversing *Auer* would have been a more direct approach, noting "[u]mpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules. (So too here." *Id.* (Justice Kavanaugh also agreed with Chief Justice Roberts that the decision in *Auer* is distinct from *Chevron* ("[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress.") *Id.* at 2449. (Justice Alito concurred in Justice Kavanaugh's concurring opinion, putting Justice Alito in favor of the "cabined" *Auer* deference and the differentiation of *Auer* from *Chevron*. (*Id.* at 2448. (In her opinion, Justice Kagan cites *Chevron* seven time in support of *Auer*. (*Id.* at 2414, 2415, 2416, and 2417.

In *Kisor*, the U.S. Supreme Court upheld but significantly restricted the deference an administrative agency can employ in interpreting its own regulations.[101]

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[101] *Kisor* was one of three important administrative law decisions handed down by the U.S. Supreme Court during its 2018-2019 term, an indication, perhaps, that the Court is increasingly interested in the administrative state. (Erwin Chemerinsky, *How the Roberts Court Could Alter the Administrative State*, ABA JOURNAL (September 4, 2019, 6:00 AM), https://www.abajournal.com/news/article/chemerinsky-the-roberts-court-could-alter-the-administrative-state. (

In Gundy v. United States, 139 S. Ct. 2116 (2019), the Court considered an "impermissible delegation" challenge to the Sex Offender Registration and Notification Act ("SORNA"), 120 Stat. 590, 34 U.S.C. § 20901 *et seq.*, under which a convicted sex offender must register in every state where the offender resides, works or studies. (Any sex offender who knowingly fails to do so and travels in interstate commerce may be imprisoned for up to ten years, 18 U.S.C. § 2250(a). (Section 20913(d) of SORNA authorized the Attorney General to specify the applicability of the registration requirements to offenders convicted before the enactment of SORNA. (The Attorney General did so, issuing a final rule in December 2010 providing SORNA applies to all pre-Act offenders, 75 Fed. Reg. 81850. (*Gundy*, 139 S. Ct. at 2122. (Petitioner, Herman Gundy, pleaded guilty under Maryland law to sexually assaulting a minor. (After his release from prison, he moved to and resided in New York, but failed to register in New York as a sex offender, and was convicted of violating § 2250. (Gundy claimed that authorizing the Attorney General to apply SORNA to pre-Act offenders was an unconstitutional delegation of legislative power. (The District Court and the Court of Appeals for the Second Circuit rejected that claim, "as had every other court (including eleven Courts of Appeals) to consider the issue," and the U.S. Supreme Court granted certiorari. (*Id.* at 2122. (Justice Kagan, joined by Justices Ginsburg, Breyer and Sotomayor, wrote the plurality opinion upholding Gundy's conviction, in which she determined that the delegation of that authority to the Attorney General "easily passes constitutional muster" and that,"[i]ndeed, if SORNA's delegation is unconstitutional, then most of the government is unconstitutional." *Id.* at 2121, 2129, 2130. (Justice Alito concurred in the judgment, writing: "If a majority of this Court

were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. (But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment." *Id.* at 2131.

The other administrative law decision issued by the U.S. Supreme Court in its 2018-2019 term is Department of Commerce v. New York, 139 S. Ct. 2551 (2019), in which the Court addressed the citizenship question that, in March 2018, Secretary of Commerce Wilbur Ross decided to reinstate on the 2020 census forms. (In response, two groups of plaintiffs filed suit in Federal District Court in New York challenging his decision. (The actions were consolidated. (*Id.* at 2562-64. (The District Court decided that the Secretary's action was "arbitrary and capricious, based on a pretextual rationale, and violated the Census Act." The District Court vacated the Secretary's decision and enjoined him from including the citizenship question on the census. (*Id.* at 2564-565. (The Government appealed to the Second Circuit and also asked the U.S. Supreme Court for expedited review because the census form had to be finalized by the end of June, 2019. (*Id.* at 2565. (In a 5-4 decision authored by Chief Justice Roberts, and joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, the Court decided that including the citizenship question did not violate either the Enumeration Clause of the Constitution or the Census Act. (*Id.* at 2567, 2568, 2573-574. (The Court concluded that the Government failed to provide a sufficient justification for its decision to reinstate the citizenship question to meet the requirements of the Administrative Procedures Act, namely "[r]easoned decision making" which explains the agency's action. (*Id.* at 2576. (The Court determined that the reason advanced by the Government – obtaining census-based citizenship data which would permit better enforcement of the Voting Rights Act ("VRA") – "seems to have been contrived," and that "viewing the evidence as a whole" the Government failed to adequately explain how improved citizenship data leads to better enforcement of the VRA. ("What was provided here" the Court said, "was more of a distraction" than reasoned decision making. (*Id.* at 2575-576. (Hence the Court remanded the case to give the Commerce Department the opportunity to justify the inclusion of the citizenship question. (*Id.* at 2576. (The Trump Administration subsequently decided not to proceed further in order to have the census forms printed on a timely basis. (Chemerinsky, *supra.*

While the Court noted that permitting administrative agencies to exercise such deference "retains an important role in construing agency regulations," it also recognized "deference is sometimes appropriate and sometimes not" and "[w]hether to apply it depends on a variety of considerations that we have noted now and again, but compile and further develop today" in order that such deference may be "potent in its place, but cabined in its scope."[102]

The Court addressed the multitude of reasons agency regulations may genuinely be ambiguous (such as not clearly analyzing an issue, being susceptible to more than one reasonable reading, careless drafting, awkward wording or opaque construction),[103] and provided insightful examples of ambiguous regulations: (1) whether Americans with Disabilities Act regulations mandating that people with disabilities have lines of sight at sporting events comparable to members of the general public means the Washington Wizards must construct seating so that wheelchair seating can see the game with lines of sight over spectators when they rise to their feet or when they remain seated; (2) whether the Transportation Security Administration regulations, which requires that liquids, gels, and aerosols in carry-on baggage be packed in containers smaller than 3.4 ounces and carried in a clear plastic bag applied to a packed jar of truffle pâté in the same way; or (3) whether a Mine Safety and Health Administration regulation requiring employers to report occupational diseases within two weeks after they are diagnosed clearly defines the term "diagnosed." [104]

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[102] *Id.* at 2408. ("Cabined" is frequently defined as "confined to close quarters." *See*, Your Dictionary, https://www.yourdictionary.com/cabined; s*ee also*, Merriam Webster Disctionary, https://www.merriam-webster.com/dictionary/cabin ("to confine or restrain").

[103] *Kisor*, 139 S. Ct. at 2410.

[104] *Id.* at 2410.

Deference, the Court explained, presumes that the agency will carry out the intent of Congress, that the agency which wrote the regulation has better insight into its meaning, and that the agency's judgment is grounded in policy concerns underlying the regulatory ambiguity.[105] Furthermore, deference leads to greater consistency in interpreting genuinely ambiguous rules, because judges are far less likely to know the meaning of the regulation and bypassing piecemeal judicial interpretations likely leads to greater uniformity,[106] illustrated by *Auer* itself:

> [F]our Circuits held that police captains were "subject to" pay deductions for disciplinary infractions if a police manual said they were, even if the department had never docked anyone. (Two other Circuits held that captains were "subject to" pay deductions only if the department's actual practice made that punishment a realistic possibility. (. . . (Had the agency issued an interpretation before all those rulings (rather than, as actually happened, in a brief in this Court), a deference rule would have averted most of that conflict and uncertainty.[107]

The Court then examined "some of the limits inherent in the *Auer* doctrine."[108] "First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous," *i.e.*, after exhausting all of the "traditional tools" of construction, the court must conclude

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[105] *Id.* at 2412-13.

[106] *Id.* at 2413-14. (

[107] *Id.* at 2414. (Because the legal principles examined by the Court in Part II-A of the decision did not garner a majority vote, they do not represent binding precedent. *See, supra,* text accompanying notes 89-95.

[108] *Id.* at 2415.

"the meaning of the words used is in doubt" and more than one "reasonable construction of a regulation" exists.[109] Second, the agency's reading must be reasonable, *i.e.*, it falls "within the bounds of reasonable interpretation." Third, the court "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight," *i.e.*, the agency's regulatory interpretation (1) is the agency's "authoritative" or "official position" rather than an *ad hoc* statement not reflecting the agency's views, (2) emanates from agency officials or staff, (3) implicates in some way the agency's substantive expertise, (4) is the agency's "fair and considered judgment," and (5) does not create "unfair surprise" to the regulated parties."[110]

The Court next rejected the two statutory arguments advanced by Kisor to abandon *Auer* deference: (1) *Auer* is inconsistent with the judicial review provision found in Section 706 of the Administrative Procedures Act (APA),[111]

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[109] *Id.*

[110] *Id.* at 2416-18.

[111] 5 U.S.C. § 706, Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393. ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. (The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

and (2) *Auer* wrongfully circumvents the APA's notice and comment procedures required in rulemaking under Section 553 of the APA.[112] The Court determined that granting

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(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

[112] 5 U.S.C. § 553, Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383:

"(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

deference to an agency's interpretation of its own regulations is perfectly consistent with Section 706 of the APA.[113] The Court noted that deference cannot be granted unless, after using the traditional methods of interpretation and performing a "thoroughgoing" review, the court finds that the regulation is "genuinely susceptible to multiple reasonable meanings" and that the agency's interpretation lines up with one of those meanings and is "authoritative, expertise-based, considered, and fair to the regulated parties."[114] Performing this task, the Court states, provides "meaningful judicial review" required by Section 706.[115] Furthermore, the practice of granting deference existed at the time of the APA's enactment, and the APA did not suggest that that the practice should be curtailed.[116] Hence, the APA did not "significantly alter the common law of judicial review of agency action."[117]

The Court also determined that *Auer* does not circumvent the notice and comment procedures of the APA's rulemaking requirements under Section 553.[118] The Court noted that, unlike the issuance of "legislative rules," the APA permits agencies to issue "interpretive rules" without

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(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

[113] *Kisor*, 139 S. Ct. at 2418-19.

[114] *Id.* at 2420.

[115] *Id.* at 2419.

[116] *Id.*

[117] *Id.* at 2419-20. (The legal principles examined by the Court in Part III-A of the decision did not garner a majority vote, and are therefore not binding precedent. *See, supra,* text accompanying notes 96 - 100.

[118] *Id.* at 2420.

notice and comment,[119] because interpretive rules, unlike legislative rules, do not "have the force and effect of law" and do not otherwise "bind private parties."[120] Rather, interpretive rules merely advise the public of the agency's understanding and likely application of its legislative rules, and granting deference to interpretive rules does not confer the "force and effect of law," because interpretive rules can never form "the basis for an enforcement action."[121] In contrast, an enforcement action can be undertaken only pursuant to a legislative rule, which must go through notice and comment in order to be valid.[122] Likewise, when a court decides to grant deference to an agency's interpretation of its regulations, the court must comply with the same "procedural values" which are contained in the notice and comment requirements of Section 553, and hence *Auer* deference "reinforces, rather than undermines, the ideas of fairness and informed decision making at the core of the APA."[123]

The Court also rejected Kisor's policy argument that regulatory agencies are encouraged to issue vague regulations so that the agency can later impose whatever interpretation of those rules it prefers.[124] The Court stated that there was "[n]o real evidence – indeed, scarcely an anecdote" - to support the assertion, and two noted scholars who closely studied the claim wrote: '[W]e are unaware of, and no one has pointed to, any regulation in American history that, because of *Auer*, was designed vaguely.'"[125] Likewise, regulatory agencies have strong incentives to

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[119] *Id.*

[120] 5 U.S.C. § 553 explicitly provides that notice and comment provisions do not apply to interpretive rules. (*See, supra,* note 99. (

[121] *Kisor*, 139 S. Ct. at 2420.

[122] *Id.*

[123] *Id.* at 2420-21.

[124] *Id.* at 2421.

[125] *Id.* citing Sunstein & Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 308 (2017).

write clear and precise regulations.[126] Regulators "want their regulations to be effective and clarity promotes compliance," and the issuance of ambiguous regulations poses two long-term risks to the agency: increasing the chance of an adverse court decision overturning the regulation and facilitating the ability of "future administrations, with different views, to reinterpret the rules to their own liking."[127] Similarly, "regulated parties often push for precision from an agency so that they know what they can and cannot do."[128] The Court concluded, "Add all of that up and Kisor's ungrounded theory of incentives contributes nothing to the case against *Auer*."[129]

The Court also rejected Kisor's constitutional argument that *Auer* violates the "separation of powers principles" in two respects: usurping the interpretative power of the courts and improperly commingling legislative and judicial functions within an agency.[130] With respect to the former, the Court noted: "[T]his opinion has already met [this argument] head-on. (Properly understood and applied, *Auer* does no such thing. (In all the ways we have described, courts retain a firm grip on the interpretive function."[131] With respect to the latter, the Court noted that commingling of legislative and judicial functions within an agency has been going on "since the beginning of the Republic," and "does not violate the separation of powers . . . because . . . even when agency activities take legislative and judicial forms, they continue to be exercises of the executive power."[132]

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[126] *Id.* at 2421.
[127] *Id.*
[128] *Id.*
[129] *Kisor*, 139 S. Ct. at 2421. (
[130] *Id.* at 2421.
[131] *Id.* at 2422.
[132] *Id.* (internal quotation marks omitted)

Nor, the Court determined, does *stare decisis*, adherence to which is "a foundation stone of the rule of law," support Kisor's position.[133] "Overruling precedent is never a small matter."[134] It requires "special justification," which exceeds "an argument that the precedent was wrongly decided."[135] Overruling *Auer* would reverse not only "a single case, but a long line of precedents . . . going back 75 years or more," in which the Court has applied *Auer* deference.[136] Reversing *Auer* would also unleash the relitigation of, and force courts to wrestle with, *Auer*'s impact on those decisions, and introduce "so much" instability into many areas of the law, "all in one blow."[137] Indeed, Congress has "chosen acceptance" of the Court's deference decisions.[138] While Congress could have amended the APA to require *de novo* interpretation of regulatory interpretations, "it has let our deference regime work side-by-side with the APA and the many statutes delegating rulemaking power to agencies."[139] There being no indication *Auer* is "unworkable" or that *Auer* is a "doctrinal dinosaur," and the Court having "taken care today to reinforce the limits of *Auer* deference," the Court declined to reverse *Auer*.[140]

Having addressed the arguments raised by Kisor against *Auer* deference, the Court returned to the issue of Kisor's retroactive VA benefits and the meaning of the term "relevant records" in the VA regulation.[141] The Board understood records to be relevant if they related to the reason for denying VA benefits; Kisor argued records were relevant

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* at 2423.
[140] *Id.*
[141] *Id.*

if they addressed any benefit criterion.[142] Relying on *Auer* deference, the Federal Circuit upheld the Board's interpretation, "casually" remarking "that [b]oth parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable."[143] In doing this, the Federal Circuit "jumped the gun" by declaring the regulation ambiguous without employing all of its interpretive tools to "make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning."[144] Second, the Court noted, *Auer* deference does not automatically apply when the court determines a genuine ambiguity exists.[145] Rather, the court "must assess whether the interpretation is of the sort that Congress would want to receive deference."[146] The Solicitor underscored the need to make this assessment when he explained that the 100 or so members of the Board make about 80,000 decisions individually each year, none of which has precedential value.[147] That being so, a Board member's ruling might not qualify as the "considered judgment" of the VA as a whole.[148] That question, the Court noted, is "exactly the kind [of issue] the court must consider in deciding whether to award *Auer* deference to the Board's interpretation."[149] Accordingly, the Court vacated the judgment below and remanded the case for further proceedings.[150]

VI. REACTIONS TO *KISOR*

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[142] *Id.*
[143] *Id.*
[144] *Id.* (
[145] *Id.*
[146] *Id.*
[147] *Id.* at 2424.
[148] *Id.*
[149] *Id.*
[150] *Id.*

Commentators' responses to the U.S. Supreme Court decision in *Kisor* are divided. (Some applaud but others deplore. (Falling into the latter category, Eric Schmitt, the Attorney General of Missouri, claims *Kisor* "missed a golden opportunity to restore the role of federalism and the separation of powers in federal administrative law," and, the federal courts having whiffed, "state courts . . . should work to restore the place of these fundamental principles to agency-deference doctrines under state law."[151] He opines that the significant restrictions imposed on courts before they are permitted to grant deference will surely "generate voluminous 'threshold' litigation over whether *Auer* applies at all," similar to the 'threshold' litigation that already bedevils the application of *Chevron* deference."[152] In light of *Kisor*'s majority having failed to respect the principles of federalism and the separation of powers, Attorney General Schmitt issues "a call to action to state courts and state attorneys general to clarify agency-deference doctrines at the state level," where courts can "carefully consider whether *Kisor*'s splintered opinions and multi-factored tests properly safeguard constitutional structure and the separation of powers at the state level."[153]

Similarly, Cory Andrews and Corbin Barthold, respectively Senior Litigation Counsel and Litigation Counsel at the Washington Legal Foundation, which filed an *amicus* brief in support of the petitioner in *Kisor*, lament that *Kisor*'s "fight to abolish Auer deference - and to check the

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[151] Eric S. Schmitt, *Kisor v. Wilkie – A swing and a miss*, SCOTUSblog (Jun. 27, 2019, 12:46 PM), https://www.scotusblog.com/2019/06/symposium-kisor-v-wilkie-a-swing-and-a-miss/.

[152] *Id.* at 2.

[153] *Id.* at 3.

administrative state - is lost, at least for now."[154] *Auer*, they insist, forces the judge to interpret binding regulations to mean "not what he thinks they mean, but what an executive agency says they mean," putting "the power to make, enforce and interpret laws into the same hands" and blurring separation of powers under the Constitution.[155] "Under that venerable scheme," they conclude, "Congress enacts laws; executive branch agencies promulgate rules to implement those laws; and courts interpret the meaning of the words that comprise both the laws and the rules." *Auer*, they complain, "confuses—or worse, ignores—these distinctions."[156]

Thomas Merrill, the Charles Evans Hughes Professor at Columbia Law School, described the *Kisor* decision as "shadow boxing with the administrative state."[157] The decision, he says, reveals "very broad agreement among the justices. (No one defended the unadorned standard in *Auer*."[158] Justice Kagan's approach retained "the label '*Auer*' deference but crafted new standard of review;" Justice Gorsuch wanted *Auer* overruled and replaced by "the contextual standard of review associated with *Skidmore v. Swift & Co.*[159] While Gorsuch's approach adopts *Skidmore,*

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[154] Corbin K. Barthold and Cory L. Andrews, *A Small Win For James Kisor; A Big Loss For The Constitution*, SCOTUSblog (Jun. 27, 2019, 2:19 PM), https://www.scotusblog.com/2019/06/symposium-a-small-win-for-james-kisor-a-big-loss-for-the-constitution/.

[155] *Id.*

[156] *Id.*

[157] Thomas W. Merrill, *Shadow Boxing With The Administrative State*, SCOTUSblog (Jun. 27, 2019, 7:00 AM), https://www.scotusblog.com/2019/06/symposium-shadow-boxing-with-the-administrative-state/.

[158] *Id.*

[159] *Id.* at 2. (Skidmore v. Swift & Co., 323 U.S. 134 (1944). (Under the *Skidmore* approach:

> [D]eference exists on a sliding scale, rather than an all-or-nothing conclusion that emerges after a sequential inquiry. (The court remains responsible for the interpretation, and whether the court

which has been around since 1944, Justice Kagan's approach, which draws roughly upon the same factors as

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adopts the agency view depends on how the various contextual factors stack up, either for or against the agency. (The more the factors favor the agency, the more 'persuasive' the agency view becomes, but at no point is the court compelled to adopt the agency view. (Merrill, *supra* note **Error! Bookmark not defined.**. (

In *Skidmore*, some of the workers engaged in fire hall duties stayed in the fire hall overnight three or four days per week. (They sought overtime compensation under FLSA for their night duty, during which time they were provided with sleeping quarters, a pool table, a domino table, and a radio, but no fires occurred and few alarms rang. (The workers were paid their normal compensation plus additional compensation for each alarm. (The trial court ruled that the overnight fire hall duty did not constitute working time as interpreted by the Administrator, and the Circuit Court of Appeals affirmed. (U.S. Supreme Court said courts were not bound by the Administrator's determination:

> [T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. (The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. (*Skidmore*, 323 U.S. at 140.

Chief Justice Roberts captured the main difference between *Skidmore* and *Kisor* as follows:

> That is not to say that *Auer* deference is just the same as the power of persuasion discussed in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L.Ed. 124 (1944); there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions. (But it is to say that the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation. (*Kisor*, 139 S. Ct. at 2424-25.

Skidmore, is untried.[160] Hence, *Kisor* "is likely to produce significant uncertainty among lower court judges, agencies and persons contemplating a challenge to agency interpretations."[161] Moreover, Merrill claims, agencies should be free to change their interpretation under Kagan's approach, provided they engage in the extensive review envisioned in *Kisor*. (In contrast, under *Skidmore,* the interpretation is ultimately the court's, which means the agency might not be able to change its interpretation.[162]

Michael Hertz, the Arthur Kaplan Professor of Law at Yeshiva University's Cardozo School of Law, notes that the Court's opinion catalogues all of the limitations and weaknesses of *Auer*, "rests solely on *stare decisis* as the reason not to overrule it," and does nothing to cut back or overrule *Auer*."[163] Lower courts, he opines, will "likely be more circumspect applying *Auer* going forward," because *Auer*, like the doctrine of *stare decisis*, forces judges to set aside their own view of the best result in light of some other decision maker's judgment."[164] Liberal administrations might use *Auer* to expand the reach of regulations, just as conservative administrations might use *Auer* to cut back on the reach of regulations, and doing so is much easier than "undoing rules," as the "Trump administration is currently learning the hard way."[165] Hence, "a robust *Auer* doctrine should make it easier for agencies to reverse course. ((If that

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[160] Merrill, *supra* note 144, at 3.
[161] *Id. (*
[162] *Id.*
[163] Michael Herz, *Auer survives by a vote of 4.6 to 4.4,* SCOTUSblog (Jun. 27, 2019, 11:30 AM), https://www.scotusblog.com/2019/06/symposium-in-gundy-ii-auer-survives-by-a-vote-of-4-6-to-4, at 2, (last accessed on August 28, 2019) at 1.
[164] *Id.* at 3.
[165] *Id.* at 4.

is not the case, then there has been a lot of fuss over nothing.)"[166]

Daniel Walters, assistant professor of law at Penn State Law, says: "The first line in Justice Neil Gorsuch's partial concurrence in *Kisor v. Wilkie* says it all: 'It should have been easy for the Court to say goodbye to *Auer v. Robbins*'."[167] Instead, in a decision that surprised nearly everyone, the "court turned back the tide and declined the long awaited invitation to do away with *Auer* deference."[168] In Professor Walters' view, the Court's "failure to jettison *Auer* deference feels like a major turning point in the conservative legal movement's campaign against the administrative state."[169] Chief Justice Roberts' "stark reliance on *stare decisis* as the sole basis for retaining *Auer*," Professor Walters says, "made it crystal clear that there are immovable barriers to his participation in the actual deconstruction of the administrative state," and overcoming *stare decisis* in the future will be a barrier "in every effort to undo the administrative state by judicial fiat."[170] "There should be no mistake," he continues, "Roberts' decision to save *Auer* deference is a devastating setback for opponents of judicial deference to agency legal interpretations, and all the more so because it is based entirely on *stare decisis*."[171] Professor Walters concludes:

> *Kisor* will, I suspect, be canonical. (Part of its staying power will come from the exceptionally lucid articulations of two

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[166] *Id.*

[167] Daniel Walters, *Laying bare the realpolitik of administrative deconstruction*, SCOTUSblog (June 27, 2019), https://www.scotusblog.com/2019/06/symposium-laying-bare-the-realpolitik-of-administrative-deconstruction/.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

> completely different understandings of the necessity of the administrative state in Kagan's opinion for the court and Gorsuch's partial concurrence. (The initial reaction of many legal scholars is that these are masterfully written and paradigmatic statements of the major perspectives in administrative law today—and I agree. (But the decision will also likely come to be known as the decision that laid bare the realpolitik of administrative deconstruction. (Faced with the real consequences of its actions, the Supreme Court blinked. (As it turns out, the court is as frozen between 'administrativism' and 'anti-administrativism' as is the body politic.[172]

Finally, Ronald Levin, the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis, observes that *Auer* survived, but not without a plethora of mixed messages and only on the basis of *stare decisis*.[173] Kagan's plurality and Gorsuch's concurring opinion, Professor Levin notes, were "far apart on the core question of whether deference to agencies' interpretations of their own regulations is desirable."[174] Kagan's arguments in favor of retaining but restraining judicial deference "have been embraced by judges for decades" and that "track record enabled her to deploy a strong *stare decisis* argument—one that even [Chief Justice] Roberts found telling."[175] "In

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[172] *Id.*

[173] Ronald Levin, *Supreme Court chooses evolution, not revolution*, SCOTUSblog (June 27, 2019), https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/.

[174] *Id.*

[175] *Id.*

contrast, [Justice] Gorsuch's concurring opinion . . . displays a viewpoint that, in historical terms, is relatively new at the Supreme Court level: full-scale, heated opposition to the very existence of judicial deference," which "reflects the disillusionment with the administrative state that has become such a prominent feature of our politics during the past decade."[176] In Professor Levin's view, the "refurbished" version of *Auer* is "far removed from the fundamental antipathy to deference that pervades [Justice] Gorsuch's concurring opinion," making "it fair to conclude that a majority of the Court, as currently constituted, rejects that approach."[177]

VII. *Chevron v. National Resources Defense Council, Inc.*

In contrast to *Kisor*, which retained a highly cabined judicial deference to administrative agencies' interpretation of their own regulations, *Chevron v. National Resources Defense Council, Inc.* granted judicial deference to administrative agencies' interpretation of the statutes the agencies administer, thereby creating an administrative principle known as *Chevron* deference or the *Chevron* doctrine.[178] The premise of the *Chevron* doctrine is that courts must give judicial deference to an agency's interpretation of the statute which the agency is charged with administering.[179] Two conditions must, however, must be present: (1) the intent of Congress must be ambiguous, unclear, or hidden, and (2) the agency's interpretation must be reasonable.[180]

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[176] *Id.* (

[177] *Id.* at 3.

[178] Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[179] *Id.* at 842.

[180] *Id.* at 842-43.

Chevron arose out of regulations addressing national air quality standards issued by the Environmental Protection Agency ("EPA").[181] The 1977 amendments to the Clean Air Act imposed certain requirements on "nonattainment" states, *i.e.*, those states that had failed to achieve national air quality standards established by the EPA pursuant to earlier legislation.[182] As a result, the nonattainment states were required to obtain permits under a state-established permit program for the regulation of "new or modified major stationary sources" of air pollution.[183] In 1981, the EPA promulgated regulations containing a plant-wide definition of the term "stationary," under which pollution-emitting devices within the same industrial grouping were considered to be encased in a single, virtual bubble.[184] As long as the overall emission of pollutants from the bubble met the emission standard, the existence of particular pollution-emitting devices which did not meet the standard were permitted.[185]

National Resources Defense Council, Incorporated challenged the regulations in the Court of Appeals for the District of Columbia, which set aside the regulations.[186] The Court of Appeals "stated that the bubble concept was 'mandatory' in programs designed merely to maintain existing air quality, but held that it was 'inappropriate' in programs enacted to improve air quality."[187] Because the permit program, in the Circuit Court's view, was designed to improve air quality, the "bubble concept was inapplicable" and the regulations were "contrary to law." The U.S.

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[181] *Id.* at 840.
[182] *Id.*
[183] *Id.*
[184] *Id.* at 841.
[185] *Id.*
[186] *Id.* (Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).
[187] *Chevron*, 467 U.S. at 841. (

Supreme Court granted certiorari and reversed the judgment of the D.C. Circuit Court of Appeals. [188]

The question before the U.S. Supreme Court was what standard of review should be applied when a governmental agency construes a statute which the agency is charged to administer. (In essence, the Court had to determine what judicial deference, if any, should be given to an agency's interpretation:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. (If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. (If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. (Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[189]

The U.S. Supreme Court determined the Court of Appeals "misconceived the nature of its role in reviewing" the bubble regulation.[190] Having decided that Congress had not formulated an intention with respect to the bubble

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[188] *Id.* at 842.
[189] *Id.* at 842-43.
[190] *Id.* at 845.

concept in the permit program, the U.S. Supreme Court held that the Court of Appeals should not have decided the bubble concept was inappropriate to the permit program. (Rather, the court should have decided whether the agency's view was reasonable in the context of the particular program.[191]

The U.S. Supreme Court then embarked on a detailed and lengthy review of the origins, development, and refinement of the bubble concept by the EPA,[192] the statutory language defining the term "stationary source,"[193] the "unilluminating" and "silent" legislative history of the bubble concept,[194] the likelihood that the EPA was properly motivated by the need to both allow reasonable economic growth and administer environmental protection in its rulemaking process,[195] and the multiple "policy" arguments advanced by the parties that more properly should be addressed to legislators and administrators, "but not to judges."[196] The Court then noted that judges are not environmental experts and may rely on the administrative agency's "view of wise policy to inform its judgment."[197] When Congress, either inadvertently or intentionally, did not resolve policy issues in enacting legislation, but left the resolution of those policy issues to administrative agencies, "judges have a duty to respect legitimate policy choices made by those [administrative agencies]."[198] Hence, the Court upheld the EPA's "permissible construction of the statute," and reversed the judgment of the Circuit Court of Appeals.[199] In doing so, it enshrined the two step process to determine when deference is accorded to an administrative

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[191] *Id.*
[192] *Id.* at 846-59.
[193] *Id.* at 859-62.
[194] *Id.* at 862.
[195] *Id.* at 863-64.
[196] *Id.* at 864.
[197] *Id.* at 865.
[198] *Id.*
[199] *Id.* at 866.

agency's interpretation of the statute it is charged to administer: (1) if the court determines that the language and meaning of the statute is clear and unambiguous and that the regulatory action of the agency conflicts with the plain meaning of the statute, the court may hold that the agency's interpretation or action is unlawful; and (2) if the court determines that the language of the statute is silent or ambiguous, the court should defer to the judgment of the agency and uphold the agency's regulatory interpretation, unless it violates the arbitrary and capricious standard, *i.e.*, not based on a consideration of relevant factors, including viable alternatives available to the regulatory agency, or a result of a clear error of judgment by the agency on the basis of the information available to the agency at the time it took the action in question.[200]

VIII. *Kisor*'s Impact on *Chevron*

The U.S. Supreme Court's willingness to review the judicial deference accorded to administrative agencies' interpretations of their own regulations in *Kisor* caused some observers to believe that the Court would move on to review and possibly eliminate *Chevron* deference.[201] As Professor Walters noted, "The only question that remained was just what the result in *Kisor* would foreshadow about future challenges to *Chevron* deference."[202]

Chevron is clearly distinguishable from *Kisor*. *Chevron* provided judicial deference to agency regulations interpreting statutes whose language is silent or ambiguous;

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[200] *Id.* at 843-44.

[201] Weiss, *supra* note 5, at 2.

[202] Walter, *supra* note 114. (*See,* Barthold, *supra* note 141, at 4 ("The fight over Auer deference toward ambiguous regulations may be lost; but a fight over deference under [Chevron] toward ambiguous laws is surely on the horizon." *See also*, Levin, *supra* note 173 ("Inevitably, *Kisor* raises questions about the continued viability of [Chevron].").

Kizor provides a highly cabined deference to agency interpretations of its own regulations. The foundation of *Chevron* deference is the clarity of the statute; the foundation of *Kisor* deference is the bulletin, uninvited amicus brief, interpretive rule, or Administrative Law Judge's decision in which the agency provides its interpretation. (The regulations to which *Chevron* deference are granted have the force of law; the agency's interpretations of its own regulations do not. The regulations to which *Chevron* deference are granted are subject to notice and comment procedures; the agency's interpretations of its own regulations are not (despite the plurality's insistence judicial review provides the same "procedural values").[203] Given the significant differences between *Chevron* and *Kisor,* it is difficult to see how *Kisor* will have any impact on *Chevron.*

Moreover, a fair reading of *Kisor* confirms this conclusion. (Notably, Chief Justice Roberts "went out of his way to say that *Kisor* has no impact on *Chevron*, and Justice Kavanaugh, joined by Justice Alito in a short concurrence, agreed."[204] That augurs well for *Chevron*, because "*Kisor* is

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[203] Kisor, 139 S. Ct. at 2420.

[204] Merrill, *supra* note 144, at 2. (Chief Justice Roberts wrote:
I write separately to suggest that the distance between the majority and Justice Gorsuch is not as great as it may initially appear. (The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise. (Justice Gorsuch, meanwhile, lists the reasons that a court might be persuaded to adopt an agency's interpretation of its own regulation: The agency thoroughly considered the problem, offered a valid rationale, brought its expertise to bear, and interpreted the regulation in a manner consistent with earlier and later pronouncements. (Accounting for variations in verbal formulation, those lists have much in common. (*Kisor*, 139 S. Ct. at 2424.
Justice Kavanaugh wrote:

strong evidence that, barring a change in the court's membership, the court will continue to adhere to that incremental process, eschewing the total overthrow that [Justice] Gorsuch would so obviously welcome."[205] Perhaps the two-step *Chevron* review[206] will be supplemented with the five steps in the *Kisor* review, but no significant change to *Chevron* is likely to occur in the absence of a major change to the composition of the U.S. Supreme Court.[207]

IX. SUMMARY

I agree with the Chief Justice that "the distance between the majority and Justice Gorsuch is not as great as it may initially appear. . . . (If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. (After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation. (In other words . . . courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations. (*Kisor*, 139 S. Ct. at 2448.

[205] Levin, *supra* note.

[206] *Chevron*, 467 U.S. at 842-43. ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. (If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. (Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

[207] As summarized by Chief Justice Roberts, the court must determine whether (1) the underlying regulation is genuinely ambiguous; (2) the agency's interpretation is reasonable; (3) the agency's interpretation is authoritative and expertise-based; (4) the agency's interpretation is its fair and considered judgment; and (5) the agency's interpretation takes account of reliance interests and avoids unfair surprise. (*Kisor*, 139 S. Ct. at 2424.

This article closely examines (1) the highly anticipated and closely watched decision of the U.S. Supreme Court in *Kisor v. Wilkie*, which significantly cabined but did not overrule judicial deference provided to government agencies' interpretation of their own regulations, (2) the two major U.S. Supreme Court decisions—*Seminole Rock* and *Auer*—which recognized and launched that deference; (3) two U.S. Supreme Court decisions—*Gonzales v. Oregon* and *Christopher v. SmithKline Beecham Corp.*—which have imposed limitations on judicial deference to government agencies' interpretation of their own regulations, namely (a) the government agency's interpretation of its regulations is not entitled to deference if it merely parrots the language of the statute, and (b) the government agency's interpretation cannot impose a potentially massive liability on parties who relied on the agency's prior interpretation of the regulation; and (4) the reactions of legal scholars and commentators to the *Kisor* decision. (

The article also closely examines the U.S. Supreme Court decision in *Chevron*, which decided that regulations developed by government agencies interpreting genuinely ambiguous statutes are also entitled to judicial deference, contrasts *Chevron* deference with *Kisor* deference, and predicts that *Kisor* will have little substantive influence on *Chevron* deference.

Much to the surprise of several court observers, the U.S. Supreme Court did not reverse *Auer*, the sole issue for which the Court presumably granted certiorari. (Rather, the Court converted a run-down and battered fixer-upper into a sturdy cabin which will house judicial deference to government agencies' interpretations of their own regulations for another era. (Following *Kisor*, courts will be unable to grant deference to a government agency's interpretation of its own regulations unless: (1) using all of

the traditional tools of construction, the court concludes a genuine ambiguity exists; (2) the agency's interpretation of its regulation is reasonable; (3) the agency's interpretation is an authoritative rendition of the agency's official position and implicates in some way the agency's substantive expertise; (4) the agency's interpretation is a fair and considered judgment of subject matter that the legislature delegated to the agency for implementation; and (5) the agency's interpretation takes into account the reliance of parties and avoids unfair surprise. (Significantly, this result stemmed not from the merits of judicial deference to agency interpretation of its own regulations, but from the doctrine of *stare decisis*, adherence to which is a "foundation stone of the rule of law."[208]

[208] Kisor v. Wilkie, 139 S. Ct. at 2422.